DOCUMENT RESUME

ED 149 333 CS 203 838

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TITLE Today "Kaleidoscope"; Tomorrow the "New York Times."
PUB DATE Aug 77
NOTE 57p.; Paper presented at the Annual Meeting of the Association for Education in Journalism (60th, Madison, Wisconsin, August 21-24, 1977)

EDRS PRICE MF-$0.83 HC-$3.50 Plus Postage.
DESCRIPTORS Civil Rights; *Confidentiality; Confidential Records; *Court Litigation; Ethics; *Freedom of Speech; News Media; *Newspapers; *News Reporting; *Press Opinion

ABSTRACT

This paper examines the facts of the Knops case, a Wisconsin Supreme Court decision that deals with freedom of the press, underground newspapers, and reporter's privilege (not to reveal a news source), and surveys the news coverage of the Knops case to evaluate the stance of the Wisconsin press in regard to reporter's privilege. The paper concludes that the Wisconsin media coverage of the Knops case was extensive but little better than no coverage at all, since the media did not accept responsibility for educating the public about the value, to the public, of reporter's privilege or about the challenge to freedom of the press that was created by the decision in the Knops case. (Author/RI)

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"Today Kaleidoscope; Tomorrow the New York Times"

By

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"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

Carolyn Stewart Dyer

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC) AND USERS OF THE ERIC SYSTEM."

Paper presented to the Law Division, Association for Education in in Journalism, Madison, Wisconsin, August 24, 1977.

CS203838

The case of Mark Knops, editor of the Wisconsin underground newspaper Madison Kaleidoscope, provided a bittersweet interlude in the history of the First Amendment guarantee of freedom of the press and the issue of reporter's privilege.

In State v. Knops,[1] the Wisconsin Supreme Court became the first state supreme court to recognize a constitutional right for newsmen to protect the identity of their confidential sources. Coming just days after contrary state court decisions in Branzburg v. Pound and In re Pappas[3] that portion of the decision was welcome reaffirmation of the circuit court opinion in Caldwell v. United States.[4] But after recognizing that privilege, the court immediately exercised the authority, which it had reserved for itself, and imposed limits on the right. The court decided that the facts of Knops required the finding that the state had an "overriding public interest"[5] in the information Knops was withholding from a grand jury and that his conviction and sentence for contempt of court should stand.

The facts concerning and circumstances surrounding Knops' case, conviction and confinement seem almost apocalyptic when they are scrutinized after their occurrence and after the U. S. Supreme Court's refusal to recognize a constitutional reporter's privilege.[6] They illustrate how fragile freedom of the press is when those who have a vested interest in its protection allow themselves to become distracted by secondary issues and those who hold power disregard press freedom for what may be justifiable ends without regard for the means.

As the plot for a grade B detective movie, the Knops story is "laced through with deep tragedy, Keystone Cop comedy and bitter irony."[7] Involved in the action are revolutionary sabotage of a government facility, rivalry among three law enforcement agencies and their egotistical leaders, the political posturing of an election campaign, active participation in the investigation on the part of a major newspaper, flagrant violation of mint-new federal guidelines designed to prevent the abuses and confusion which did occur, and an agitated public.

This paper will examine the facts of the Knops case and the landmark decision in order to extract from them the broader implications for freedom of the press, which were quite well obscured at the time of the events. It will also survey the news coverage of the case and the editorial statements about it to evaluate the stance of the Wisconsin press in regard to reporter's privilege. As implied above, the interaction between the Knops case and seemingly irrelevant, external events is complicated. To make the subsequent discussion comprehensible, the paper will first detail the relevant background and facts of the case.

II. Mark Knops and the Man[8]

On the evening of August 26, 1970 Mark Knops, editor of the underground newspaper Madison Kaleidoscope, received a statement from the New Year's Gang. The self-proclaimed revolutionary group claimed credit in the statement for the fatal bombing of Sterling Hall on the University of Wisconsin campus early the previous Monday morning, August 24, 1970.[9] The statement linked the bombing to revolutionary activities throughout the world and listed a series of demands, which

BOMB
Extra!
BOMB

VOL. 2 MADISON NO. 17

INSIDE THIS ISSUE: WOMEN'S LIB

25¢

Open war next!

KALEIDOSCOPE

EXCLUSIVE TO KALEIDOSCOPE

The Bombers Tell Why & What Next

Exclusive statement by the bombers of the Army Math Research Center to Madison Kaleidoscope (Monday 24 August):

"Our every action is a battle cry against imperialism...wherever death may surprise us, let it be our welcome, provided that this, our battle cry, may have reached some receptive ear and another hand may be extended to wield our weapons..." - Che Guevara

Today (24 August) the battle cry against imperialism was raised once again, as the mathematics research center of the U.S. army was struck by revolutionary cadres of the New Years Gang.

The AMRC, a think-tank of American militarism, was a fitting target for such revolutionary violence. As the major U.S. army center for solving military mathematical problems, it bears full responsibility for american military genocide throughout the world. While hiding behind a facade of academic "neutrality," the AMRC plays a vital role in doing the basic research necessary for the development of heavy artillery, conventional and nuclear bombs and missiles, guns and mobile weapons, biological weapons, chemical weapons, and much more.

Its neutralist facade is exposed even by its self-proclaimed policy of operation: "To anticipate the needs of the army, and when it is able to develop or learn of new techniques to meet these needs, it should forthwith call these to the army's attention and help it find the area in which these techniques can be used."

Today's (24 August) explosion was the culmination of over a year's effort to remove AMRC's ominous presence from the Wisconsin campus. Previous efforts to even negotiate were met with indifference. Such is the response of imperialistic authority to public sentiment. Our actions, therefore, were deemed necessary, for with every passing day, the AMRC takes its toll in mutilated bodies.

We see our achievement as more than just the destruction of one building. We see it as part of a world-wide struggle to defeat american imperialism, that monster which is responsible for the starvation and oppression of millions over the globe, that monster which is a direct outgrowth of corporate capitalism.

For this reason, we declare solidarity with our revolutionary brothers in Uruguay, the Tupamaros, who are struggling to loosen the U.S. military and corporate grasp on their continent. We also declare our solidarity with the San Rafael four, revolutionary black brothers who died fighting the racist court system. But more importantly, we declare our solidarity with each and every peasant, worker, student and displaced person, who, in his day-by-day existance, struggles against the oppressive conditions heaped upon him by the monster.

The Vanguard of the Revolution demands the immediate release of the Milwaukee 3, the abolition of ROTC, and the elimination of the male supremacist women's hours on the Wisconsin campus. If these demands are not met by October 30th, revolutionary measures of an intensity never before seen in this country will be taken by our cadres. Open warfare, kidnaping of important officials, and even assasination will not be ruled out. Although we have sought to prevent any physical harm to all people in the past, we cannot be responsible for the safety of pigs if our demand are not met.

Power to the People! - Marion Delgado

Editor's Note: The detonation was supposed to occur five minutes after the phone call to the Madison Police. It exploded prematurely. The New Years Gang regrets the death of Fassnacht.

From the Daily Cardinal, Dec. 12, 1975, 12.

In 1970, Mark Knops, editor of the now defunct Kaleidoscope, was found in contempt of court for refusing to answer a grand jury's questions about this communique. He was jailed for nearly six months.

"I don't regret anything I did or said at all," says Knops. "If I were back in the same situation, it'd probably happen the same way."

were to be met by state and university officials, if political kidnappings were to be averted in the future.[10] In his communication from the gang, Knops was also asked to relay the revolutionary message to the other Madison media.

Knops told representatives of the media that the statement was written to be issued after the bombing on Monday, but that for unknown reasons it had not been issued until Wednesday.[11] He did not say how he received the message.

The Kaleidoscope staff quickly prepared a special edition of the paper. Copy for the classical extra--a special cover for the then current issue--was rushed to the printer in Port Washington.[12] The special edition was on the street in Madison the following day, Thursday, August 27.

The "Bomb Extra" splashily displayed the message from the underground: "Exclusive to Kaleidoscope: The Bombers Tell Why and What Next."[13]

Why? The statement said the bombing was necessary because previous attempts to negotiate were met with indifference and because "with every passing day, the AMRC (Army Mathematics Research Center, the target of the bomb) takes its toll in mutilated bodies."[14]

What next? The gang demanded

> the immediate release of the Milwaukee 3, the abolition of ROTC and the elimination of the male supremacist women's hours on the Wisconsin campus. If these demands are not met by Oct. thirtieth, revolutionary measures of an intensity never before seen in this country will be taken by our cadres. Open warfare, kidnapping of important officials and even assassination will not be ruled out.[15]

Within 30 minutes of each other late Thursday evening both federal and state authorities served subpoenas on Knops.[16] Both

ordered him to appear before grand juries. The federal subpoena, prepared by U. S. Attorney John O. Olson was apparently conceived and drafted first.[17] It ordered Knops to appear on Monday, August 31, before a federal grand jury to be empaneled in Madison. He was to bring with him "all notes, written records, correspondence and articles dealing with the New Year's Gang."[18] The state subpoena ordered Knops to appear the next morning, Friday, August 28, before a grand jury sitting at Elkhorn in Walworth County. The grand jury there had been investigating the firebombing the previous winter of the administration building on the Whitewater State University campus in that county. The jury had been in recess, but it was called back into session on Tuesday, August 25, at the request of Attorney General Robert Warren who received a written "order" to do so from Gov. Warren Knowles.[19]

Knops told a Capital Times reporter he did not plan to cooperate with the grand jury.

> If they think they're going to intimidate me or Kaleidscope they're dead wrong. They want Kaleidoscope to reveal all its sources, but an underground paper depends on confidential relationships to gather news of its own community.[20]

He told a Milwaukee Sentinel reporter "he would not appear and would not divulge the information demanded by the subpoena."[21]

Later Thursday evening, Knops apparently consulted with a Madison attorney Neil Eisenberg. Eisenberg, a former alderman from the "Miffland" youth community in the city, said later that he had refused to represent Knops because he didn't want to get mixed up with the bombing.[22] Knops subsequently found attorneys Frederick E. Sherman of Madison and David Loeffler of Milwaukee to represent him on Friday.

Although he had made his stand clear as soon as the subpoenas were issued, Knops did attend the grand jury session in Elkhorn Friday. At first he refused to answer questions posed by claiming the constitutional protection against self-incrimination.[23] The attorney general's staff quickly gained permission to grant Knops immunity from prosecution in order to encourage him to cooperate. When the questions were put to him again, he refused to answer, claiming that he had a constitutional right to protect the identity of his news sources.[24]

The questions were as follows:

> Are you salaried by Madison Kaleidoscope?
>
> Mr. Knops, do you write articles for the Madison Kaleidoscope?
>
> Mr. Knops, did you write an article in what is indicated as Vol. II, No. 17 of the Madison Kaleidoscope, apparently published Thursday, August 27?
>
> Mr. Knops, did you have communication in either written or oral form with a representative or messenger of the group claiming to be responsible for the bombing of Sterling Hall in Dane County?
>
> Mr. Knops, have you written news articles during the week beginning August 24 regarding the bombing of Sterling Hall in Dane County?
>
> Mr. Knops, during the year 1970 did you write articles for Madison Kaleidoscope or any other newspaper about the arson of the Administration Building on the Whitewater University state campus?
>
> Mr. Knops, have you obtained information in either written or oral form from a person or persons responsible for the arson of the Administration Building on the Whitewater campus?
>
> Mr. Knops, did you this afternoon have a conversation in the courtroom with a Donald A. Pfarrer, a reporter for the Milwaukee Journal?[25]

These questions clearly did not ask directly for Knops' sources of information. But they did delve into other touchy areas. The question about his authorship of any articles regarding the bombing was probably directed at an article which reported the bombing and

indirectly indicated the writer's approval of the action.[26] If the jury knew Knops condoned the bombing, it could be expected to press on to implicate him in the actual action. The question asking whether or not Knops was salaried by the paper could be interpreted as a probe into the murky question of what a journalist is. If Knops was not salaried--and there is good reason to believe he was not[27]--it could be expected that the state would attempt to demonstrate that Knops was not a journalist at all, which it subsequently did attempt to do.[28]

The final question apparently was added after Knops was dismissed from the proceedings, pending recall to be charged with contempt. He spoke with Pfarrer for about 10 minutes.[29] Pfarrer asked questions similar to those posed for the grand jury, but he did not learn anything substantial. Immediately after Pfarrer interviewed Knops, Pfarrer was subpoenaed by the grand jury. He spent about an hour answering questions about his conversation with Knops and his contacts, as a reporter, with radicals. He said, in essence, that he had no information about the bombing.[30]

Because of his refusal to answer questions, Knops was taken before Walworth County Judge Erwin Zastrow who formally charged him with contempt of court, on a warrant issued by Attorney General Robert Warren.[31]

Assistant attorney general Peter Peshek asked the judge to schedule "a very, very prompt hearing date . . . because of the very serious nature of the crime being investigated and because of the information Mr. Knops has in his possession."[32] Knops' attorney requested time--until the middle of the following week--to permit the preparation of the defense.[33] Judge Zastrow then scheduled the

hearing for 4 p.m., Sunday--two days later--and Kaleidoscope commented ironically, "Who sez there aint no speedy justice?"[34]

On the subject of bail, the judge agreed that the $25,000 figure recommended by the attorney general was too high, but he didn't seriously consider Sherman's proposal that Knops be freed without posting bond. Sherman argued that Knops had appeared willingly for the Friday grand jury session, and there was no reason to doubt he would show up for his Sunday hearing.[35] Judge Zastrow set bail at $15,000, and since Knops couldn't pay it, he was sent to the county jail. Sherman told reporters that he was convinced "that the bond is designed to keep Mr. Knops in custody."[36] Kaleidoscope was more blunt, claiming that Knops had been "kidnapped" and was being "held hostage"[37] by the state which, in essence, believed a Knops in jail was worth four bombers in flight.

The bond was unusually high for a civil violation, especially when it is recognized that many other reporters charged with contempt have spent months and years free while their cases were pending decision.[38]

In another development Friday, the subpoena served by federal authorities Thursday night was suppressed by Attorney General John Mitchell in keeping with the then new guidelines on issuing subpoenas to reporters. U. S. Attorney Olson told the Capital Times that he had drawn up the Knops subpoena himself, and that it was withdrawn because it had been issued without the required personal approval of Mitchell, who less than three weeks earlier had announced the new rules.[39]

Olson said he got the subpoena himself because "my position is that he (Knops) is not a newsman and Kaleidoscope is not a newspaper."[40] In the issues he said he had examined, Olson said he "didn't see any

similarity between that (the content) and news."[41] A Justice Department spokesman said that the real reason Olson had issued the subpoena without permission was that he was afraid Knops would disappear before permission was granted.[42]

At the time of the Knops subpoena, John Husben a public information officer for the Justice Department, said in Washington that the department had neither decided whether to treat the underground press the same as other media, nor, in words attributed to Mitchell, "whether the underground press merits the same protection as that given to the established press."[43] It was added, however, that the reissuing of a subpoena for Knops "indicates Justice is treating underground papers like other newspapers, at least in this instance."[44]

After going through the motions of rescinding Olson's unauthorized subpoena, Mitchell authorized a new subpoena later Friday by phone.[45] There was no specific evidence that the Justice Department had met any of the other conditions which Mitchell had outlined as new standard operating procedure.[46] In particular, there was no opportunity to negotiate with Knops, since he was in Walworth all day Friday. It is possible that the Mitchell approval of a subpoena followed so quickly on his suppression by virtue of the escape clause in the guidelines--a provision for emergency subpoena requests where all conditions need not be met.[47] It is also possible--though there is no overt evidence--that Mitchell discussed the subpoena with higher authorities. He was among several cabinet members visiting with President Richard Nixon in San Clemente, California, when he called with his approval for a new subpoena.[48]

For the Sunday afternoon hearing Knops' attorneys called on two Capital Times staff members and two men from the Chicago Journalism Review to testify on the importance of confidential sources to reporters. The attorney general's office was represented by assistant attorneys general David Mebane, Peter Peshek and Jeffrey Bartell.[49]

Knops' attorneys argued first that a Walworth County grand jury did not have the jurisdiction to investigate a Dane County bombing. In answer to the challenge Mebane revealed the purpose of the investigation--to investigate a possible conspiracy, which took place in Walworth County, to bomb both the Whitewater building and the Madison building. Mebane read the letter Gov. Knowles sent to Atty. Gen. Warren shortly after the bombing and elaborated further on the secret grand jury investigation.[50]

The prosecution attorneys made "an issue of the fact that Kaleidoscope does not look or read like a 'real' newspaper."[51] Ron Dorfman wrote in the Chicago Journalism Review that he was asked by Mebane whether "the public interest required First Amendment protection of a paper that 'explains and excuses bombing and murder.' It did," he continued, "in precisely the same sense that the public interest requires protection of newspapers like the New York Times that explain and excuse official and governmental violence--including bombing and murder."[52]

David Zweifel, who was then vice president of the Capital Times' American Newspaper Guild unit, testified that the Guild takes a strong position on a reporter's right to confidentiality, and apparently he made no distinction between above-ground and underground newspapers.[53]

Judge Erwin Zastrow said in his opinion that reporter's privilege was a "worthy idea," and he claimed that the reporters who testified in Knops' behalf "have been most persuasive."[54] He pointed out, however, that there were no state laws giving reporters privilege in Wisconsin and no federal law "he knew of,"[55] which provided such protection. The judge's understanding of the concept of reporter's privilege seems to have been flawed. He participated in the questioning of defense witnesses along with the three assistant attorneys general. The following exchange was cited by Kaleidoscope as an example of his view of newsman's privilege.

> Zastrow: Well, in other words, you still have your First Amendment right, you still have a choice. You don't have to reveal your source; you can always go to jail.
> Reporter: I don't call that a right if I have to go behind bars to exercise it.
> Zastrow: That's not responsive.[56]

In sentencing Knops to six months in jail and denying his plea for bail, the judge described the balancing problem he faced and the issue which would later concern the Wisconsin Supreme Court when it decided the Knops case.

> When two forces clash, something's got to give. Here we have a collision between the First Amendment privilege and the forces of law and order. In this case, I'm afraid it's the First Amendment privilege that has to give, in the interest of justice.[57]

Before Knops was taken to his cell, he was permitted to talk to reporters. He told one reporter he did not have the information which would solve the bombings.[58] He added that he would answer questions only "as a last resort" and that he hoped he would be freed without having to testify at all.[59] His refusal to testify, he said, set a "precedent for other underground editors and reporters as 'they' (the authorities) intensify their efforts to restrict our freedoms."[60]

The conviction, Knops said, didn't surprise him. "The attorney general doesn't particularly like me or Kaleidoscope,"[61] and "we . . . have no doubt he (Zastrow) was hand-picked by the governor and attorney general to preside over this investigation."[62]

If the timing and interpretation are correct, Warren's executive assistant Daniel Hanley appears to have "decided" the Knops case or to have been stating the justice department's position on Knops before the Sunday hearing began. If Hanley's statement did preceed the hearing, then it lends credence to Knops' contention that the Elkhorn investigation was actually being directed in Madison. Hanley commented at length for the UPI on Knops situation. A former UPI newsman himself, Hanley told the Madison bureau chief:

> Knops is going to sit in the can. He's not a martyr to the newspaper profession. He's a nut. Knops has never been asked to reveal his sources. There was no specific question to reveal his sources, so how is he going to claim that?. . . All he has to do (to purge himself) is say a few words to the grand jury.[63]

The "can" Knops was assigned to was a reception cell in the new Walworth County jail. The cell was designed for keeping persons for brief periods while they awaited bail or transfer. Knops, however, spent at least three weeks in the tiny, windowless space which was lighted 24 hours a day.[64] He was neither permitted to talk to other inmates nor allowed to have books or newspapers to read.[65]

On Monday, August 31, the federal grand jury was convened in Madison without Knops, and it recessed for 10 days after the witnesses for the day were heard. U. S. Attorney Olson said that he would not call Knops "right now,"[66] and he might not bother to call him at all if Knops didn't plan to cooperate anyway. The grand jury did hear

attorney Neil Eisenberg and his wife. Eisenberg apparently testified about his refusal to represent Knops, and his wife corroborated his story.[67]

Some time on Monday, Hanley allegedly intruded again, this time by tipping the Milwaukee Journal to the identity of the informant who had contacted the governor shortly after the bombing and suggested the conspiracy theory.[68] A Kaleidoscope story said that two Journal reporters then met with the informant, who Kaleidoscope discredited as a habitual liar and heroin addict.[69]

The meeting reportedly took place late at night in a Madison hotel.[70] After the meeting, the reporters Alex Dobesh and Tom Lubenow reported they turned some information over "to a special agent of the state attorney general's office . . . getting him out of bed at 3 a.m. Tuesday (Sept. 1, 1970)."[71] The reporters also wrote a story for the Wednesday paper, which said that two Madison brothers were being sought and that the brothers had been "named in a briefing for federal and local officials" in Warren's office on Tuesday morning.[72] The brothers were not named in the Wednesday news story, however.

Not long after the Journal was on the newsstands Wednesday, J. Edgar Hoover of the Federal Bureau of Investigation unexpectedly announced the issuance of warrants for the arrest of four men in connection with the Sterling Hall bombing. He held the late afternoon news conference in Washington and did not notify either Wisconsin lawmen or news media of his plan. Local officials in Madison first learned of the warrants on the network television news Wednesday evening.[73] The Capital Times claimed that the Hanley tip, which resulted in the Milwaukee Journal story, prompted the premature

announcement. The Capital Times piece said that the timing actually hampered the investigation and attempt to capture the fugitives.[74]

When the text of the warrants was published on Thursday, it was revealed that federal agents had found a letter and copy of the New Year's Gang statement in a Madison trash can. The Capital Times story pointed out that the warrant stated the letter was postmarked two days after the date on which it was published in Kaleidoscope.[75]

The following week Knops' attorneys filed a petition for a writ of habeus corpus with the state supreme court, and arguments were scheduled for September 17.[76] In his brief Loeffler said:

> A journalist must be permitted to place a mantle of confidentiality over the source of his information when gathering news in relation to political subjects or matters of extreme tension and polarity affecting broad areas of public policy.[77]

In their arguments before the court, both the state and Knops' attorneys elaborated on the arguments they had presented to Judge Zastrow in Elkhorn.

Although Knops had not actually been asked to identify his sources, Loeffler argued, the constitutional right to protect sources "even against the power of the state" could be invoked.[78] He said that Knops had refused to answer the first eight questions because he knew the next ones would have been directed at his sources. Loeffler argued that the defendant had to invoke the privilege before the source questions were asked because, "you cannot pick and choose on which questions you are going to invoke the privilege."[79]

While he steadfastly held to the position that reporter's privilege is a constitutional right, Loeffler said the right is not absolute. "It may be taken from him," Loeffler said, "if it can be

shown that a matter of significant state concern would be defeated absent the information this man could provide."[80]

Perhaps Loeffler was attempting in oral argument to coopt the state's arguments by offering this concession. Since warrants had already been issued for four men in connection with the Sterling Hall bombing he may have assumed it was safe to assume Knops' testimony was no longer critical to the grand jury's investigation. Whatever his intention, Loeffler provided the court with the raw material for its own opinion following Knops' second appeal.[81]

Assistant attorney general Peter Peshek concentrated on the subject of administration of justice in the state's argument. He claimed that the "sanctity, effectiveness and integrity of the grand jury system will be destroyed if newsmen are allowed the right not to testify."[82] He said "fear of contempt"[83] is the only weapon the grand jury has to compel cooperation.

Assistant attorney general Jeffrey Bartell addressed the reporter's privilege argument directly. He discounted the claim of constitutional privilege and shifted to the subject of statutory protection.

> The public is the real beneficiary of freedom of the press. It is also the beneficiary of a fair administration of justice. Therefore it is up to the elected representatives to determine whether the privilege is granted.[84]

Bartell also pointed out that a shield law had been rejected by the Wisconsin legislature several times, as if to indicate the people's will had been made known.

A few days later, Tuesday, September 22, the court denied the writ of habeas corpus without ruling on the arguments. In its denial the court noted that Knops' arguments, even if they were valid, were

inapplicable because the eight questions he had refused to answer did not inquire into the identity of his sources.[85] The court thereby rejected Loeffler's claim that it is necessary to assert the constitutional privilege at the earliest possible moment, even before it specifically applies.

Apparently anticipating the ruling, Knops met with his attorney over the weekend and decided to answer the questions in order to "allow a clearcut appeal to the Supreme Court for refusing to identify his sources."[86]

So Knops returned to the grand jury on Wednesday, September 23, to go through the procedural motions necessary to clarify his position in preparation for a new appeal.[87] In a morning session of the grand jury he answered the eight questions and purged himself. He was released for an hour and a half after receiving a new subpoena to appear before the jury again.[88] During the three-hour afternoon session he was asked the following five questions, and he refused to answer them.

> Mr. Knops, you have previously stated that you have information regarding the arson of Old Main on Whitewater State University campus which would be of interest to the grand jury, that this information was obtained by conversation with certain individuals. Would you please identify the person or persons in question and the nature of your conversation with them?
>
> Mr. Knops, regarding those conversations you had with individuals about said individuals' use and possession of explosives during the last 12 months, please identify the person in question and the nature of your conversation.
>
> All right, Mr. Knops, you say you have information as to the identity of the persons or persons who placed a bomb near Sterling Hall on August 24 in Madison, Wis., which blew up that building, causing the death of an individual in the building. What is that information?
>
> What is the name of the person who communicated with you on August 26 at your residence in Madison, Wis., regarding the bombing of Sterling Hall in Madison, Wis.?

> Mr. Knops, you have stated that on August 26, 1970, you had a conversation at your residence with a representative of the persons responsible for the bombing of Sterling Hall in Madison, Wis., Was that person male or female?[89]

After refusing to answer the questions Knops was released again briefly, while a complaint was typed. Kaleidoscope claimed that these frequent short respites from the reception cell and grand jury probe were deliberately planned to weaken Knops' resolve to maintain his silence. "The bastards were merely rubbing it in his face again what open space and people who were free to go and friends were like,"[90] the paper said.

After the new complaint was typed, Knops appeared before Judge John Voss who quickly found him guilty of contempt again.[91]

Loeffler again requested that Knops be released on his own recognizance or on bail. But Peshek argued that bail was necessary "to keep the heat on (Knops) until he cracks."[92] Judge Voss denied the plea for bail and sentenced Knops to five months and seven days in the county jail. He gave Knops credit on the new sentence for the 24 days he had already spent in jail.[93]

During one of the periods of freedom, Knops discussed his case with reporters. He claimed the "System" was "trying to crush the paper, not just me."[94] His sentence, he said, was "just another instance of the movement to suppress Kaleidoscope. They're busting hawkers and trying to close the office . . . . They're doing everything possible to make it impossible for that paper to function."[95]

The editor, who had already spent about as long in jail on a contempt charge as anyone ever had, said that if he "had it to do all over again, he would have 'gone underground' and made himself unavailable for subpena sic service . . . . I'd do everything in my power to avoid it."[96]

Since he had not avoided the subpoena in the first place, Knops said he would never reveal his sources, "never in a million years."[97] Under the circumstances in which he found himself, he said he was "representing all Wisconsin newsmen in his appeal."[98]

The second appeal was a certainty. Loeffler said that the decision in the case had been anticipated and that the supreme court had already agreed to hear the appeal in November.[99]

The date of the appeal hearing was changed to December 2, and since all requests for bail had been denied, Knops languished in the Elkhorn cell. In the interim he began to gather support.[100] The Milwaukee chapter of Sigma Delta Chi, the professional journalism society, and the national organization itself adopted resolutions in November supporting Knops' position. Several Milwaukee attorneys representing the Wisconsin Civil Liberties Union filed an amicus curiae brief with the supreme court in Knops' behalf. And 10 days after the court heard Knops' appeal--and more than three months after he was jailed--15 University of Wisconsin journalism faculty members signed a statement of protest against Knops' jailing. Though tardy, the support was welcomed and appreciated, even by Kaleidoscope,[101] which generally took a scornful view of the whole journalism establishment during the Knops case.[102] The above-ground support did come before the note of appreciation of Knops' sacrifice was received from the New Year's Gang in March--after the battle was over and lost.[103]

The delays and postponements, which Kaleidoscope claims were the fault of the court and the attorney general's office, provided Knops' attorneys with the strongest argument available for the constitutional right to maintain the confidentiality of news sources. That was the

opinion of the Ninth Circuit Court of Appeals in Caldwell,[104] dated November 16, 1970, less than three weeks before Knops' argument before the Wisconsin Supreme Court. The appeals court had recognized not only the constitutional privilege but also the right of a newsman to refuse to appear before the grand jury.[105]

Attorney Fred Sherman's oral argument before the Wisconsin court concentrated on the overriding-interest and lack-of-alternative-source rules in the Caldwell decision,[106] rather than on the decision that Caldwell need not appear at all. The burden of proof, he said, should be on the state to show a pressing need for the newsman's testimony.[107]

Representing the state, assistant attorney general Bartell claimed that imposing the burden of showing compelling need for the testimony on the state would destroy the secrecy necessary to grand jury proceedings.[108] He also pointed out that the Wisconsin court was not bound by the appeals court decision in Caldwell, anyway.

As in his previous argument before the court, however, Bartell concentrated on the question of reporter's privilege. He said the Ninth Circuit court had fallen into a trap by holding that gathering of news by a reporter was part of the First Amendment guarantee of freedom of the press. "Gathering of news is not a constitutional right,"[108] he said. He continued, explaining that many reporters refuse to accept confidential information from officials[109] and reminding the court once again that the Wisconsin legislature had rejected reporter's privilege many times.[110]

Before the session was over, the court denied Knops' fourth request for bail pending the decision, but the court indicated an opinion would be ready at the earliest possible date, the first week in January, 1971.[111]

Knops' attorneys then moved to the federal courts. They went to Federal District Judge John Reynolds in Milwaukee who had jurisdiction over the Elkhorn area, with a plea for bail. And they went to the Western District court in Madison with a motion to quash the federal grand jury subpoena which was still pending.

Judge Reynolds heard the bail petition on December 17. At the hearing Knops promised to remain in Wisconsin if bail were granted and said he would keep his attorneys informed of his exact whereabouts. He also told Judge Reynolds that his position in the case was necessary "to establish some measure of professionalism for the underground press" in order that contempt convictions don't plague the underground papers "again and again."[112]

After finding that Knops' constitutional claims "are substantial" and that the state "has not contended that Knops is dangerous or likely to flee the jurisdiction,"[113] Reynolds ordered that Knops be released on $1,000 bond. On Christmas Eve, 1970, Knops was set free in Milwaukee after spending nearly four months in jail. That period was "the longest stretch any journalist in the history of the U. S. has ever done for denying information to a government board."[114]

The motion before the Madison federal court required no argumentation. Rather than see the motion through Federal Judge James Doyle's court, U. S. Attorney Olson withdrew the Knops subpoena with the explanation, "We already knew all Knops could tell us and MORE."[115] Kaleidoscope claimed that despite their competition for the honors in solving the bombing case, both state and federal authorities were agreed that Knops should be kept away from "Judge Doyle, the notorious, liberal Bill of Rights coddler (who) can't be relied upon to throw a newsman in the slams."[116]

The first week in January, 1971, came and went without a court decision. If Knops and his attorneys were as alert to the fate of the Caldwell principles as they were to the rules themselves, they found no encouragement during their wait for the Knops decision. On January 22, 1971, a Kentucky court denied a motion to suppress a subpoena served on reporter Paul Branzberg by distinguishing the facts of the case from Caldwell.[117] The court also questioned the propriety of the Ninth Circuit's ruling since it was a significant departure from recognized opinion on the subject of reporter's privilege.[118] The following week, the Massachusetts high court denounced the Caldwell opinion as disregarding the interest of law enforcement and affirmed a subpoena issued to television newsman Paul Pappas.[119]

III. ". . .And What a Decision It Was!"

The Wisconsin Supreme Court ruling[120] finally came on February 2, 1972. The court ruled that reporters do indeed have a limited constitutional protection for the identity of their sources,[121] that Kaleidoscope was a newspaper and therefore that Knops was a journalist,[122] who was entitled to the protection of reporter's privilege.[123]

After granting the limited constitutional privilege, the court proceeded to define the outer limits of the right by deciding that "Under the facts and circumstances of this case . . . the public's right to know outweighs the appellant's right of privilege."[124] It was problematic enough that the first state supreme court to recognize constitutional privilege found that it was limited; but the bitter irony in the limitation is the fact that the "public's right to know" was placed on the opposite side of the balance from the freedom of the

press. Nelson called that distinction "the unkindest cut of all" in the decision, since it split press freedom from the major reason for its existence by indicating that the public should learn the truth in spite of the press, rather than from it.[125]

Unlike the Caldwell opinion the Knops decision did not clarify the circumstances under which reporters must or need not talk to a grand jury. The only procedural rule the court established was the polar opposite of a Caldwell test. The Wisconsin court said that the reporter must show the state alternative methods of gaining the information it wants from him, if he wants to be exempted from giving that information.[126] In Caldwell the Ninth Circuit Court of Appeals required the state to demonstrate it had exhausted all alternative sources of the information before it could subpoena a reporter and compel him to testify.[127] Even Attorney General Mitchell's guidelines for federal subpoenas required that officials pursue other means of gaining information before considering a reporter as a possible source.[128]

The majority opinion written by Justice Leo B. Hanley was curious in its mundane, pragmatic language. So tied to the facts of the Knops case and the 1970-1971 political climate in Madison, Wisconsin, was the opinion that it provided little guidance to other journalists interested in determining what "compelling need" and "overriding interest"[130] really were. The court clearly based its decision against Knops on the nature of the crime about which information was sought and on the temper of the times. It seemed that Justice Hanley (and perhaps other members of the majority) recalled his physical and emotional feelings when the blast shook Madison on August 24, for he took considerable judicial notice of the situation in his opinion.

> In a disorderly society such as we are currently experiencing it may well be appropriate to curtail in a very minor way the free flow of information, if such curtailment will serve the purpose of restoring an atmosphere in which all of our fundamental freedoms can flourish. One exceedingly fundamental freedom which the public is currently doing without is the freedom to walk into public buildings without having to fear for one's life. If the public were faced with a choice between learning the identity of the bombers or reading their justifications for anarchy, it seems safe to assume that the public would choose to learn their identities.[131]

After noticing these things, Hanley seems to have been so appalled that he donned blinders before dealing with the remainder of the facts of the case. He found that Knops' testimony was absolutely crucial if the crime was to be solved.

> The mere fact that the culprits are still at large is nearly conclusive proof that the state does not know who they are. In view of these considerations, it would unnecessarily impede the solving of this case to require the state to go through the empty ritual of proving that which is already obvious, namely, that the identity of the culprits is unknown.[132]

In a partial dissent, Justice Nathan Heffernan called the court's bluff and pointed to the blind spot in its argument. He pointed out that both state and federal authorities had said they knew who did the bombing. Therefore, he said:

> We cannot conclude, merely because these suspects have not yet been arrested, that the state requires further information as to the identity of the Sterling Hall bombers.[133]

The Heffernan dissent also took issue with the court's judgement that a "very minor" curtailment of the free flow of information is appropriate. "I know of no period in history," he wrote in a footnote, "where any freedoms have flourished in the face of the state's curtailment of the free flow of information."[134] But he continued by explaining that the majority was not wrong; it simply misstated its position. Its "sound position . . . is not one approving the curtailment of

information but compelling, in the case of overriding state interest, the production of information by proper legal process."[135]

By defining the "public's right to know" as a principle which must be balanced against freedom of the press; by imposing the burden of identifying alternative sources of information on the newsman, and by failing to provide any useful generalizations from this case, which is perhaps as extreme an example of conflict between reporter's privilege and administration of justice as is conceivable, the Wisconsin Supreme Court made its Knops decision a landmark decision in a literal sense alone. Coming between the lower court rejections of Caldwell in the Pappas and Branzberg cases on the one hand and the U. S. Supreme Court's decision on Caldwell on the other, Knops was a weak last gasp for the life of a constitutional reporter's privilege.

A Wisconsin reporter attempting to live within the law outlined in Knops had to be very self-confident. He had first to determine what "compelling need" and "overriding interest" are. Then if he were working with information which might fit the definition, he had to find not one, but two, sources so that he might keep one secret and suggest the authorities try the other. The only other alternative was to wager on the ruling of a judge if he were subpoenaed, or "carry a spare toothbrush," as a Chicago Journalism Review article advised.[136]

As a result of the Knops decision, the Wisconsin attorney general's office apparently recognized a limited newsman's privilege. A United Press International reporter wrote in 1972 that witnesses subpoenaed before a Milwaukee grand jury were being read an admonition which advised them of their rights to refuse to answer questions if they would be incriminated or "if the questions involved conversations that

are privileged."[137] Privileged communications listed include those covered by state law and "'yourself in some instances where you are a journalist and we asked you to reveal the source of your information.'"[138] When asked what would happen if a newsman invoked the privilege, an assistant attorney general told the UPI reporter, "'I don't know what we'd do.'"[139]

From Mark Knops' point of view the court's finding that newsman's privilege did exist was useless, and the admonishment would probably not have protected him either. The Knops decision said, he wrote:

> a journalist has the privilege to withhold information from the state . . . except when the state wants and needs that information to punish someone. Then what the hell good is this 'privilege' if it's no good in the ONLY cases where it really matters?"[140]

Under the circumstances, the court's finding that the underground press deserved the same protection of freedom of the press as the establishment press had, seems to mean nothing more than that the state did not need special rules to punish the underground press for its transgressions. Or it meant that the establishment press should be careful if it wanted to avoid the Knops treatment.

IV. The "Straight Press" Covers the Knops Story

"As they snapped the bracelets on my wrists and led me to the lockup, there was not one reporter in the courtroom," Peter Bridge, a New Jersey newsman jailed for contempt, wrote from jail.[141] The reporter said he considered himself a "surrogate of the press" as he refused to answer grand jury questions, pursued his case through the courts and went to jail, despite the collapse of his paper, the loss of his job and the failure of the paper's owners to make good on a

public promise to pay Bridge's legal expenses.[142] But as he reflected on the lack of reporters at his hearing he said he kept wondering, "If I'm in here fighting for them, where the hell are they?"[143] When he was finally jailed for the duration of his sentence on October 4, 1972, Bridge got coverage, the press became indignant and it began examining his case in detail--too late to do any good.

When the U. S. Supreme Court finally ruled on the three reporter's privilege cases subsumed under Branzburg v. Hayes,[144] "the news coverage . . . was astonishingly casual. (Norman E. Isaacs) checked many newspapers of June 29 and 30 (1972). In some there was not a trace of the story. In scores of others, the account appeared on inside pages."[145] The poor coverage, according to an unsigned article in Columbia Journalism Review showed "that the news media still seem to lack either the inclination or the expertise to cover well those issues closest to their own interests."[146]

In his book on the underground press,[147] Leonard Leamer made a similar point. There was almost no media coverage, he said, of a trial for the publisher of the underground newspaper the Los Angeles Free Press, who was charged for printing a list of names and addresses of California narcotics agents in 1969.[148] In another part of the city, however, "journalists scrambled into the Manson trial to provide grist for the public rumor mill."[149] Leamer quoted the city editor of the Los Angeles Times as saying the Free Press case was an "ordinary trial. It has nothing to do with freedom of the press. For what they did, they got what was coming to them."[150]

An initial comparison of the Knops coverage with the coverage of Bridge's legal battles, the Caldwell decision and the Free Press trial

suggests that Knops' coverage was unique. The Kaleidoscope editor's case received extensive coverage from start to apparent finish. From the publication of the New Year's Gang statement to Knops' conviction for contempt of court, the story made page one of the Madison, Milwaukee and Janesville newspapers and several times provided the copy for the banner headlines.[151] Even in remote parts of Wisconsin, the wire service accounts of Knops' story also received prominent display.[152]

Once the facade of splashiness is penetrated, it becomes evident that the coverage of Knops' case was not really a departure from the "norm" described by Bridge, Isaacs and Leamer. It will be shown that the press did not generally recognize its own self-interest in the Knops case and therefore lost the opportunity to inform the public about the necessity of press freedom and about the consequences to the public of its limitations by the courts and other branches of government.

By analogy, the Knops case represented a combination of the Los Angeles Free Press trial and the Manson trial.[153] It was an underground newspaper editor's battle over freedom of the press on the one hand and a public spectable, like Manson, emanating from a radical attack on the public decency on the other. The press, however, focused on the case because of the sensational nature of the crime under investigation rather than because of the First Amendment question which Knops had raised.

Man-on-the-street interview stories and round-ups of official statements indicated there was substantial shock and dismay over the latest radical action in Madison and the first one to claim a human life. Politicians in the heat of election campaigns blamed each other

for creating the climate that allowed such a dastardly act to happen. Boards and committees called special meetings to hastily plan increased security for public buildings, intensified surveillance of radical groups, and improved procedures for handling disruption. And while public officials and private individuals were reacting, the suspects slipped away in the night and twice through the fingers of embarrassed authorities.[154]

In this context, the news media were mere reflectors of public sentiment and conveyors of public and official opinion about the incident until concrete evidence which might help solve the crime began to surface.

Lacking evidence at first, the media filled their news holes with reaction stories. Statements came in press releases from the West Washington Avenue justice department offices in Madison and in wires from officials in Washington, D. C. So anxious were the media for material to publish, Kaleidoscope conclude that four Republican state legislators issued "allegedly spontaneous, but coincidentally identical releases,"[155] all of which were published. But, the underground paper claimed, "these 'reactions' aren't news. It would only be news if, for instance, a state politicians' reaction were, 'Right on, New Year's Gang: I say blow the fuck out of the imperialist pig institutions!'"[156]

By the middle of September, Kaleidoscope concluded that the "straight press" coverage of the bombing and related incidents served not "to inform the reader: only to pander to his most base reactions, to articulate his superstitions and prejudices and to provide fabricated evidence for his pathetic stereotypes."[157]

As an example, Kaleidoscope fingered the irony in a Wisconsin State Journal editorial. The piece, which was the paper's own first reaction to the bombing, refers to the bombers and bombing with such terms as "murderous," "fanatical," "leftist," and "insane attempts to paralyze the community." The editorial continued, Kaleidoscope pointed out, by calling for "sensible, calm ways for all of us to respond to threats posed by anarchists who wish to destroy our society."[158]

Before continuing with an analysis of the news coverage--as opposed to the editorial comment, which will considered separately--it is important to point out here that no one was looking for objective coverage of these events or the other free-press stories. Bridge, Isaacs and Leamer were all seeking sensitive coverage and analytical treatment of the free-press issues, so the readers might learn the importance of the principle and understand the threat to its survival. They were all seeking support for their stand on freedom of the press. Kaleidoscope was looking for a not very different thing. Commenting on the Knops sentence, the underground paper wrote:

> Mark Knops is in the Walworth County jail for publishing a statement by the bombers articulating their reasons for the bombing. For publishing this statement he received six months in jail.
>
> It has, in short, become a crime to inform and to educate. The business of the pig press today is rather to preserve and protect the society.[159]

A survey of the above-ground newspaper coverage shows that Kaleidoscope was not far off base in its assessment of press performance. When freedom of the press was being tested, perhaps more directly than ever before in Wisconsin, the press was distracted by secondary issues, and rather than monitor the state's performance, it accepted the state's position almost without question.

The New Year's Gang statement was the only major development in the continuing story of the Sterling Hall bombing on Thursday, August 27. The Madison papers bannered their stories on the statement, and the Milwaukee papers gave it prominent page-one display. Both treatments of the story demonstrated an apparent desire on the part of the press to continue to go "up" with the story and the willingness to use any new information--even revolutionary political rhetoric, which normally would not gain an inch of type in the "straight press."[160] The contrast between the two Madison papers' headlines for the gang statement story illustrates what became their divergent views on the Knops case.

The State Journal excerpted long quotes from the revolutionary statement under the headline: "'Warfare, Kidnappings' Threatened/Gang Claims Credit for Blast/ Demands Include ROTC Abolition."[161] The Capital Times was more restrained in its story, as the headline suggests: "'New Year's Gang' Boasts It Perpetrated Bombing at UW: Issues Further Threats."[162] The Capital Times story also contained an interpretation of the statement and quotations from Knops, who responded to some reporter's questions.

The Friday developments in the Knops case came at an awkward time in the news cycle, and other assorted developments provided the material for the day's updates on the bombing. Both morning and afternoon papers in Madison and Milwaukee had stories on the University of Wisconsin Board of Regent's Thursday decision to establish a reward fund, on the issuing of subpoenas to Knops and therefore on the plans to begin a federal grand jury investigation of the bombing. None of the papers made a direct association between the federal and state subpoenas served on Knops. They all reported that the Walworth grand

jury was investigating the Whitewater fire-bombing, but did not indicate a suspicion that the timing suggested the grand jury was expanding its investigation.[163]

The Janesville Gazette, for which the Elkhorn grand jury was a local story, used a wire service update on the bombing investigation, reward fund and federal grand jury plans. A brief inside story from a correspondent reported a mid-morning bomb threat which emptied the Walworth County Court House Friday. The story quoted Judge Zastrow as saying he did not know whether Knops had been subpoenaed to appear before the grand jury that day.[164]

In the Milwaukee Sentinel, Ron Marose had an extensive story on the subpoenas. The reporter was interviewing Knops by phone after the federal subpoena had been served when the interview was abruptly ended as the state officials arrived to serve their subpoena on the Kaleidoscope editor. Marose's story included Knops' explanation that he did not plan to testify or turn his materials over to a grand jury, but it did not delve deeper to explain the issue of reporter's privilege.[165]

Only the Capital Times detailed the events surrounding the issuance and withdrawal of the federal subpoena. Although the Milwaukee Journal[166] mentioned the situation and quoted U. S. Attorney Olson's evaluation of Kaleidoscope, that paper did not explain the reasons for the withdrawal or the existence or nature of the attorney general's guidelines for subpoenas to newsmen. The Capital Times story was far more thorough, but it did not provide much background on the guidelines. It did indicate that Olson had flagrantly violated new rules and that he was put on the spot by higher authorities in the

justice department. And the story contained statements from Washington officials, which came to the Capital Times through its use of the Washington Post news service.[167] The content of the out-of-town papers' Associated Press stories indicates that the AP used carbons of the Capital Times story as the basis for its dispatch.

In the Saturday and/or Monday editions the newspapers made their positions on Knops known, if they had not done so already. All the Madison, Milwaukee and Janesville papers assigned staff reporters to cover Knops' appearances before Judge Zastrow on Friday and Sunday afternoons. (It is somewhat curious that the media learned there would be a court appearance for Knops on Friday since grand jury proceedings themselves are secret and only the Milwaukee Journal reporter was actually on hand throughout the day.)

Those papers most hostile to Knops' position did not hide their contempt for him on inside-page editorials. The headlines in these papers quite obviously illustrate the biases. The State Journal chose the value-laden word "defies" to describe Knops' stance before the grand jury: "Editor of Kaleisoscope Is Jailed for Contempt/ Defies Jury in Hearing at Elkhorn."[168] The most offensive headlines, however, appeared over AP stories on page one of the Saturday and Monday Green Bay Press-Gazette editions. On Saturday the paper said: "Hippie Editor Jailed in Fire Bomb Probe,"[169] and on Monday it elaborated: "Editor Draws 6-Month Term in Bomb Case."[170] Not only did the Press-Gazette rely on an inappropriate stereotype with which to identify Knops, it alsoblurred the situation so thoroughly as to imply in Monday's headline that Knops was in a very direct way implicated in the bombing.

The more neutral headlines in other papers, such as "Refuses to Testify/ Madison Editor Arrested,"[171] and "Kaleidoscope Editor Given Six Months,"[172] not only hid the papers' biases, but they failed to mention the free press issue which resulted in the charge and conviction. With one exception,[173] the reader would not have learned from any Wisconsin headline during the entire duration of the Knops case that there was a constitutional principle underlying Knops' position. The frequent and interchangeable references to "Knops" and "Kaleidoscope" and the combination of those two with "bomb" or "blast" tied the whole continuing story to the concrete event out of which it grew.

The attitude of the Wisconsin press towards the Knops case in particular becomes more obvious when the headlines for the stories are contrasted with ones which the same papers chose for the stories on the jai ing of Peter Bridge and William Farr. The Capital Times headed a story on Farr, "Judge Sends Newsman to Jail for Protecting Sources,"[174] and the State Journal gave a story on Bridge similar treatment in the head: "Reporter Jailed for Protecting Sources."[175] Not one Knops headline identified the same issue so clearly. Nor was there ever a head or a story in a Wisconsin paper during the duration of Knops' case which pursued the issue in greater depth such as these: "Newsmen's Privilege: To Serve the Public,"[176] the head for a Clayton Fritchey column in the Capital Times, or "The People Stand By as Press Freedom Fades,"[177] which capped a James Reston column in the State Journal.

There was considerable variety in the stories which accompanied the headlines on August 29 and 31, 1970, but none provided distinguished coverage of the constitutional question at hand. All focused on Knops'

apparently naughty behavior and on the relationship between the grand jury investigation and the Sterling Hall bombing.

The Milwaukee Sentinel carried a sidebar on Knops which provided room to include Knops' evaluation of the situation and issues. While recognizing Knops as a figure worthy of attention, the story and another published when Knops went to court again in September, was weak on the constitutional background that would have made it very instructive to the public.[178] The Sentinel also ran news stories on the charges and hearings for both August appearances and the September events.

The other newspapers gave a minimum of space to Knops' statements at the Sunday news conference. Most simply included a quote from the conference and statements from the defense arguments on Sunday as the sum of their explanation of the legal issues.

The Janesville Gazette's stories in the August 29 and 31 papers and again at the time of the September release, recharging and reconvicting were surprisingly detailed and often more insightful than the metropolitan competitors' versions.[179] One explanation for the quality of the small paper's coverage might be that Dorothy Stivarius regularly covered the Walworth County courts, and as a result she was alert to sublties in the behavior of the local judge and court officials. Her accoumt of the Sunday hearing presented more of both the state and defense arguments, and therefore she dealt with the constitutional question more thoroughly, than any other medium, with the exception of Kaleidoscope, which had a clearcut self-interest, and the Chicago Journalism Review which exists to report on issues of major interest to journalists.[180]

The State Journal provided undistinguished accounts of the story both days. There was little attention paid to Knops' position, as the articles focused on the importance to the state of Knops' testimony to solve the crime.[181]

From the time of Knops' charge and conviction through the Supreme Court's decision on the case the Capital Times, the Sentinel and the Janesville Gazette continued to provide staff coverage of the developments.[182] The Janesville paper, however, relied on the wires for the Madison arguments before the Supreme Court and the court's decision. With those exceptions all three papers staffed the hearings and sentencings, Knops' bail hearing before Judge Reynolds and the Reynolds' opinion, Knops' release from jail, the arguments before the Supreme Court, the statements of support from SDX, the WCLU and the UW journalism faculty and the court's decision. Despite this extensive coverage, the media still failed to address the issue which made the events a continuing story.

All the relevant newspapers have been accounted for but the Milwaukee Journal, which vacillated wildly in its attention to the story. Its coverage and what will be shown as its interested participation in some of the events requires separate consideration.

From internal and external evidence it appears that the Journal Company and the Milwaukee Journal in particular went beyond its responsibilities as a member of the fourth estate as the Knops case developed.

The company's first involvement was announced in a banner headline on the front page of the Sentinel on Saturday, August 29.[183] The story announced that the company had wired $5,000 as a contribution to the

university regents' reward fund as soon as word came about its creation. The participation in the fund itself might be insignificant. But given the highly political nature of the crime under investigation and the partisan political conduct of that investigation, the announcement seems to gain a grandstanding connotation. Coming at a time when a shadow of suspicion had been cast on Kaleidoscope for the publication of the New Year's Gang statement and on Knops for refusing to cooperate with the authorities, the contribution seems to have been a silent statement by the Journal Company that it would cooperate with authorities.

The Journal was the only news medium to have sent a reporter to Elkhorn Friday morning when Knops was to appear before the grand jury. Reporter Donald Pfarrer, who had been covering radical politics since June, 1970, went on assignment to report about who appeared before the grand jury. His assignment there was part of the Journal's coverage on many fronts of one of its biggest stories ever, Pfarrer says. Being the only reporter around, he was on hand to talk to Knops when he was dismissed by the grand jury. In about 10 minutes of interviewing Knops, Pfarrer reported he asked how Knops had gotten the message from the New Year's Gang, whether it was legitimate, and how Knops knew the bomb had been planned to explode later than it did. The interview, Pfarrer said, was as fruitless as the grand jury questioning of Knops had been. [184]

Immediately after the Knops interview, Pfarrer was served with a subpoena ordering him to appear before the grand jury Friday afternoon. He called Journal managing editor Harry Hill and told him that he had been subpoenaed and that his interview with Knops had been on the record. Hill told Pfarrer it was Journal policy to

cooperate with the grand jury. Although he declined at the time to comment on the secret grand jury proceedings,[185] Pfarrer has since said he responded to questions about his interview with Knops, offering to read from his notes, and about radical political activity in general. He said he told the grand jury he did not have any information about the bombings or bombers, that he had not learned such information either in talking to Knops or covering radical politics for a few months. Asked about his background, Pfarrer told the jury he had recently been a naval gunfire officer in Vietnam. His general cooperation, his involvement in the war and perhaps the fact that, he says, "I look like an FBI agent--I look honest and sound honest," apparently satisfied the grand jury that he had supplied all the information he could.[186] He was probably a reporter the attorney general referred to in his supreme court appeal brief that contrasted Knops with other newsmen. The brief says, "Several other newsmen have been called by, and have cooperated with, the Walworth grand jury, providing valuable information."[187] Who such others were and what was considered valuable about their testimony is not known.

Pfarrer wrote about his interview with Knops and mentioned his appearance before the grand jury in his Saturday story.[188] Reporter Tom Lubenow covered Knops' Sunday contempt hearing.[189]

It was Lubenow who received a tip about the informant who apparently identified the bombers.[190] According to other news media, Daniel Hanley, the state attorney general's executive assistant provided the tip on Monday.[191] It is unclear whether Lubenow and Alex Dobesh had arranged before their interview with

the informant to report their findings to the attorney general's office. Their description of the 3 a.m. call to an investigator suggests such an arrangement.[192] But their efforts, as investigative reporters, to solve the crime may have suggested the urgency. Lubenow has declined to answer such questions by letter.[193] A question remains regarding the reason for reporting that the reporters had made the early morning phone call.

The Journal provided evidence that the company and some of its reporters had joined with the attorney general to solve the crime. And the assistance was acknowledged in the supreme court brief. There is, however, no obvious reason for this collaboration between the newspaper and the investigators beyond, perhaps, the magnitude of the crime and the story. And there is no evidence to explain why the Journal's coverage of the case was so uneven.

After sending Pfarrer to Elkhorn on a day when reason would suggest there was little chance for a substantial story--simply a listing of the witnesses who entered and left the grand jury room--the Journal failed to cover Knops' second appearance before the grand jury and his subsequent conviction on a new charge of contempt. The paper ran a brief page-one AP story on Knops' release and another wire story on his reconviction on an inside page of section two the following day.[194] Then, however, when Knops' case was argued before the supreme court, the paper's law specialist Edward Kerstein turned in the most informative story of the entire period.[195] And the Journal concluded its news coverage with a careful summary of the Knops decision.[196]

While the arguments before the court were not extensively reported (reporters rarely attend state supreme court arguments), a survey of 12 Wisconsin papers showed that the decision was given prominent display, most frequently on page one of the February 2 or 3, 1971, papers. With the exception of the Madison and Milwaukee newspapers, the state's press relied on the wire services for the decision story.[197] The most frequently used Associated Press story did mention that the court had made a landmark decision on freedom of the press, but did not explain what reporter's privilege actually is or why confidentiality was upheld. The majority of the story was a chronological account of the Knops case, reported entirely within the framework of the Sterling Hall bombing investigation.[198]

The content of the AP story on the Knops decision, with its heavy emphasis on the bombing, illustrates the weakness of the Wisconsin press coverage of the entire Knops case. The press was so distracted by the bombing that it recognized only one of its responsibilities to the public. The extensive coverage of the Knops case, that under different precipitating circumstances probably would not have gained much coverage at all,[199] seems to have resulted from the press taking its responsibility to oversee the conduct of government very seriously. That is, because of the public outrage over the Sterling Hall bombing and what came to be regarded as Knops' and Kaleidoscope's conspiratorial roles in it, the press seems to have watched the case closely to be sure that he got what was coming to him.[200] In the process of focusing on the punishment of a radical, the press was blinded to the beating which freedom of the press was taking at the same time. And, therefore, the press overlooked another of its responsibilities, namely, educating

the public about the role of a free press in a free society.

V. "There Was No Outcry, No Protest. . . ."[201]

Who knows whether insight or pomposity guided the editorial writer at the Janesville Gazette on September 1, 1970. In characteristic fashion the small-town editorial writer glanced around the neighborhood and found a subject for the day's commentary in a decision by a local judge. And he globalized the homespun conclusion:

> To say that Kaleidoscope is not a newspaper is to evade the question and ignore reality. Obviously it is a newspaper despite the fact of its comparatively small circulation and somewhat scatalogical content. If the First Amendment does not apply to the underground press, the above-ground press had better start worrying. It could be a case of Today Kaleidoscope, Tomorrow the New York Times.[202]

After so prophetic a beginning, the writer returned to Janesville, Wisconsin, and concluded that the bombing of Sterling Hall was an act of war; that the press, under such circumstances, should serve its government voluntarily and submit to censorship; and therefore, that Judge Zastrow's decision "was right in view of the circumstances."[203]

Despite its rather dramatic conclusion, which like the news coverage of Knops' case stuck to the facts of the case, the Janesville editorial was one of the few to recognize that Kaleidoscope and the New York Times (or even the Janesville Gazette) were related and that what a Wisconsin court said about the underground press applied to the established press as well. Other papers in the state, most notably the Milwaukee Sentinel,[204] had difficulty disguising their contempt for Kaleidoscope, and therefore they denied that such a publication could claim any rights. The Sentinel editorialized on the subject the day after Janesville's comment.

> We do not believe that the underground press deserves to be treated as legitimate newspapers. Indeed the underground press itself takes pride in the same view and goes out of its way to disassociate itself from responsible journalism. . . .
>
> The newspaper profession has every good reason to be loath to come to the defense of Knops or anyone else who abuses the freedom of the press right in the way in which the dirty, vicious underground press does.[205]

There can be no doubt that attitudes such as that expressed in the Sentinel editorial would blind those who hold them to any common interests with the objects of such attacks. Leamer in fact claimed that the established press' attitude towards the underground press was largely responsible for its (the established press') failure to attend to the threats against freedom of the press. Commenting on the reaction of the media to Knops' case he wrote:

> . . . a judge sentenced him to six months in jail. There was no outcry, no protest, no awareness on the part of Establishment journalists that the underground press stands in the forefront of everyone's First Amendment freedom. This is not a mere metaphor. The government's attempt to suppress the Pentagon Papers and the harassment of CBS News over the prize-winning documentary "The Selling of the Pentagon" suggests just how perishable freedom of the press really is and how stupid and naive Establishment journalists have been to ignore the plight of the underground press.[206]

Along with Leamer, one is tempted, after probing into Knops' predicament, to conclude that whole problem involved a short-sightedness on the part of the established media, and that the threats on press freedom exemplified in Knops would be withstood if only the established and alternative press could get together. Leamer documented his claim that the established press generally chooses to ignore the underground press, but he did not provide evidence which also explained why the media also left Bridge alone to fight his battles and ignored the Caldwell decision.

The disassociation of the above-ground press from the underground press must be accepted as part of the reason that Knops won so little support. But the editorials which recognized the common interests gave further reasons for failing to support Knops' position. Among the other reasons for the media's behavior was the point discussed above, that the press was very much distracted by the nature of the crime to which Knops' case was related. In his analysis of the Wisconsin editorials on Knops, Nelson found that nine of 11 papers "realized a need to balance first amendment rights against others . . . where the privilege sought . . . would have seemingly blocked access to information about violent deaths, bombing, and alleged arson."[207]

In addition to the reasons cited, the newspapers gave evidence of other factors which entered into their decisions or colored their opinions on Knops. One seems to be a narrow definition of self-interest that permitted the media to separate themselves from Kaleidoscope, not because it was an underground paper, but because it was simply someone else. Another cause underlying the failure of the media to respond to the test of reporter's privilege becomes evident when news stories in a paper are compared with editorials or more generally, the reporter is contrasted with the editor or publisher. It is obvious in several papers that newsmen took a sympathetic view of Knops' situation while the editorial writers ignored the fact that reporters for both established and underground newspapers face the subpoena threat which does not generally apply to management. These last two points will be illustrated with examples from the editorials.

A narrow definition of self-interest was implied in the critiques of media attention to Bridge's trials, the Caldwell decision and the

Free Press case. In regard to Knops, many of the Wisconsin papers that did not deny Knops' claim to be a journalist still managed to convey the impression that what they said about Knops did not really apply to them. The most clear examples of this attitude are evident in the rationalizations the Wausau and Rhinelander papers' editorials provided for their support of the supreme court's opinion. "While we always have and will continue to support the right of the journalist to conceal (his sources)," the Rhinelander Daily News editorial said, "we agree with the (court's decision)."[208] The Wausau Record-Herald's statement was nearly identical.[209]

Arv Schlaben of the Milwaukee Journal gave an apt example of narrow vision in describing the situtation in which Pfarrer was subpoenaed after talking to Knops.[210] He said it was fortunate Knops had not told Pfarrer anything, because "it would have been a real showdown," if Pfarrer had had to claim reporter's privilege. He concluded that the Journal was lucky in that situation, since Pfarrer was not cited for contempt. He failed to acknowledge the fact that Knops, on the other hand, had claimed privilege and had spent months in jail.

Schlaben's story also pointed to the other factor identified as a reason underlying the dearth of editorial support for Knops. In claiming that the Journal had good fortune in the Pfarrer incident, Schlaben did not give adequate recognition to the fact that it would have been the reporter rather than the editor or the paper who would have occupied the cell. The threat of contempt, it becomes clear, is not as serious a threat to those removed from the gathering of news and the reliance on confidential sources.

The Milwaukee Sentinel was more obviously guilty of this oversight

of the reporter's vulnerability. Sentinel reporters gave rather sympathetic coverage of Knops' arguments for confidentiality in two sidebars that detailed Knops' position[211] and in the story on the decision. The decision story gave considerable space to Heffernan's challenge to the "very minor" restriction and to Sigma Delta Chi's opposition to the decision.[212] The Sentinel editorial writer was in a different environment when he wrote: ". . . we do not view it (freedom of the press) as giving a journalist a special license to be responsible only to himself . . . . It would be constitutionally impossible to give a newsman a special right of confidentiality."[213] The editorial continued, expressing the hope that the U. S. Supreme Court would limit newsman's privilege as the Wisconsin court had. When the Caldwell decision was announced, the Sentinel was one of the few Wisconsin papers to editorialize on it. And the editorial showed almost utter contempt for reporters.

> One also must wonder whether some newsmen do not want this privilege to make their own work easier. It surely would facilitate digging out sensational dirt if a reporter had what would amount to a license from the government . . . .
>
> Granting this privilege would be in effect to issue newsmen a license to run their own law enforcement system. They would decide what crimes should or should not be prosecuted and what suspects should or should not be investigated.[214]

There was little encouragement in that position for a Sentinel reporter to risk a contempt citation by messing with controversy. Reporters for the Waukesha Freeman were nearly as clearly warned by their editorial writer that their confidences might be compromised when the paper published its Knops editorial.

> Should an occasion arise when, in the judgement of the publisher, revealing otherwise confidential sources is clearly in the public interest, this newspaper and any other would be remiss in the obligation it has to be on the side of honor and justice to stand on the point of privilege.[215]

When Knops was done, only the Capital Times continued to claim that his position was justified, and that reporter's privilege must be absolute.[216] Its strong editorial position of February, 1971, has been strengthened since. In a 1972 editorial the Capital Times chided Wisconsin editors for failing to support a shield law and for devoting their concern to profits rather than freedom of the press.[217]

It has been shown that the Wisconsin media's coverage of Knop's case was extensive from start to apparent finish. But that coverage, it has been demonstrated, was little better than no coverage at all. With few exceptions, the media did not accept the responsibility to educate the public about the public utility in reporter's privilege or the challenge to freedom of the press which was being conducted in the Elkhorn courtroom and supreme court chambers. What the coverage of Knops' case did provide was support for the opposition to the "dirty, vicious underground press"[218] and considerable justification for the limitation of press freedom.

It is not surprising, then, that tomorrow came, and it was the New York Times.[219]

NOTES

1 State v. Knops, 183 N.W. 2d 93, 49 Wis. 2d 647 (1971).

2 Branzburg v. Pound, 461 S.W. 2d 345 (Ky. 1971).

3 In re Pappas, 266 N.E. 2d 297, 358 Mass. 604 (1971).

4 Caldwell v. U.S., 434 F. 2d 1081 (9th Cir. 1970).

5 49 Wis. 2d 647, 661.

6 U.S. v. Caldwell, 408 U.S. 665, 92 S.Ct. 2686 (1972).

7 "Knops: A Political Prisoner," Capital Times (Madison, Wis.), Sept. 26, 1970, 22. (Hereafter, CT.)

8 Knops' own articles in Kaleidoscope refer to his brush with the authorities and the law as the "man."

9 "Exclusive to Kaleidoscope: The Bombers Tell Why and What Next," Madison Kaleidoscope, Aug. 26, 1970, 1. (Hereafter, MK.)

10 Ibid.

11 Dave Wagner and Jim Hougan, "'New Year's Gang' Boasts It Perpetrated Bombing at UW/ Issues Further Threats," CT, Aug. 27, 1970, 1. (Dave Wagner was cofounder of Kaleidoscope in 1969 with Knops.) In an interview three years later, Karleton Armstrong, one of the persons convicted for the bombing, said he wrote the communique and slipped it in the entrance to the newspaper office and later called the newspaper anonymously verifying the message. (Maureen Santini, "Armstrong Tells Story," Wisconsin State Journal (Madison), Oct. 14, 1973.) (Hereafter, WSJ.) Since the bombers left the area immediately after the bombing, the delay in the "delivery" of the message is curious. Not only was the statement apparently delayed in reaching Knops, it was later stated in warrants for the arrest of the accused that the statement and a letter found by federal agents in a garbage can were postmarked two days after the statement was published in Kaleidoscope. See CT, Sept. 3, 1970, 1. The author is continuing to investigate these dating discrepancies.

12 Donald Pfarrer, "Wouldn't Testify, Editor Put in Jail," Milwaukee Journal, Aug. 29, 1970, 1. Hereafter, MJ.)

13 MK, Aug. 26, 1970, 1.

14 Ibid.

15 Ibid.

16 Ron Marose, "Jury To Probe U.W. Blast," Milwaukee Sentinel, Aug. 28, 1970, 1. (Hereafter, MS.)

17 "Knops Case--Law or Politics," CT, Aug. 31, 1970, 46. The editorial says Attorney General Robert Warren prepared the state subpoena after he learned the federal authorities were doing the same. According to the Milwaukee Sentinel story, supra. 16, the federal subpoena was served at 10:15 p.m., and it ordered Knops to appear on Monday, Aug. 31, while the state subpoena was served at 10:30 p.m., while Knops was talking on the phone to the Sentinel reporter. The state subpoena preempted the federal subpoena and ordered Knops to appear on Aug. 28.

18 CT, Aug. 28, 1970, 1.

19 Tom Lubenow, "Walworth County Link Told/ Bomb Plot Born in State/ Evidence Revealed by Warren Aide," MJ, Aug. 31, 1970, 1.

20 CT, Aug 28, 1970.

21 MS, Aug. 28, 1970. The reference is apparently to the federal subpoena, which asked for the paper's records. From all accounts, it appears that the Walworth subpoena neither specifically requested that Knops bring materials nor stated anything about Sterling Hall. The first stories said only that the Walworth grand jury was investigating the Old Main fire.

22 "U.S. Cancels Plans To Question Knops," CT, Aug. 31, 1.

23 Jim Hougan and Dave Wagner, "Knops Is Jailed in Elkhorn," CT, Aug. 29, 1970, 1. The Sentinel account (Sept. 1, 1970, 1) indicates Knops was offered immunity before he appeared, an offer that was reportedly being made in exchange for testimony. Either the timing was wrong in the Sentinel account, or Knops rejected the offer.

24 CT, Aug. 29, 1970, 1.

25 CT, Sept. 1, 1970, 13.

26 The Aug. 24, 1970, issue of Kaleidoscope had a story on the bombing that described the writer's search to find out what had exploded and his discovery: "--BULL'S-EYE! ARMY MATH R C is no more!" Such a statement certainly does not indicate shock and dismay over the bombing, where were the more socially acceptable reactions.

27 Laurence Leamer, The Paper Revolutionaries: The Rise of the Underground Press (New York: Simon and Schuster, 1972), 131. Leamer said that a fine of $200 could often wipe out the entire staff of an underground newspaper. Dennis Gall, editor of Milwaukee Kaleidoscope, filed for bankruptcy immediately after folding the paper. Fines and bail for persons arrested in connection with publication and sale of that paper contributed to his financial problems. See Re Gall, 71-B-2486 (U.S.D.C., Eastern Wis. 1972); "Editor Files Bankruptcy Plea," MJ, Dec. 9, 1971.

28 Ron Dorfman, "Another Victim of Wisconsin Bombing," Chicago Journalism Review, Oct., 1970, 3. (Hereafter, Chi JR.)

29 "Refuses To Testify; Madison Editor Arrested," MS, Aug. 29, 1970, 4.

30 Ibid.

31 CT, Aug. 29, 1970. Also part of the file in Knops v. Cummings, 70-C-2708 (U.S.C.D., Eastern Wis.)

32 Jon Wegge, "Editor of Kaleidoscope Is Jailed for Contempt/ Defies Jury in Hearing at Elkhorn," WSJ, Aug. 29, 1970, 2.

33 Ibid.

34 "Kaleidoscope Editor Kidnapped/ Constitutional Rights Denied," MK, Aug. 30, 1970, 1.

35 When a federal district judge freed Knops on $1,000 bond five months later, he found there was no serious reason to believe Knops would flee. Knops v. Cummings, 70-C-2708, Memorandum Opinion and

Order, 9. See also CT, Aug. 29, 1970, 2.

36 CT, Aug. 29, 1970, 1.

37 MK, Aug. 30, 1970, 1.

38 William Farr went to jail in November, 1972, 18 months after he began fighting a contempt citation. Earl Caldwell and Paul Branzburg, whose convictions were upheld by the U.S. Supreme Court in 1972, did not go to jail, although Branzburg faced jail for a long time if he were to return to Kentucky. See Farr v. Superior Court, 22 Ca. App. 3d 60, 99 Cal. Rptr. 342 (1971), cert. denied, 409 U.S. 1011 (1972); Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646 (1972); U.S. v. Caldwell, 408 U.S. 665, 92 S. Ct. 2686 (1972).

39 "Department of Justice Guidelines for Subpoenas to the News Media," Department of Justice Memo No. 692 (Sept. 2, 1970). Reprinted in Joel M. Gora, The Rights of Reporters (New York: Avon, 1974), 249-50. The guidelines were announced by Attorney General John Mitchell in a speech on Aug. 10, 1970. The memo, dated after Knops' subpoena, was the official transmission of the guidelines to U.S. Attorneys. (Donald M. Gilmor and Jerome A. Barron, Mass Communication Law (St. Paul: W West, 1974), 509.) But they were publicized when they were outlined in the speech. For example, see: Luther Huston, "Mitchell Imposes Limitations on Dragnet Subpoena Process," Editor and Publisher, Aug. 15, 1970, 9-10.

40 CT, Aug. 29, 1970, 1.

41 MJ, Aug. 29, 1970, 1.

42 CT, Aug. 29, 1970, 2.

43 Ibid.

44 Ibid.

45 Ibid.

46 Department of Justice Memo No. 692, in Gora, 249-50. The guidelines provided that before subpoenaing reporters: a crime had to have been committed; the information sought had to be essential to the investigation; the government should have failed to get the information from non-media sources; the subpoena had to pertain to verification of published information and necessary background information; caution was to be observed when unpublished or confidential information was sought; negotiations had to be conducted between the reporter and investigator, among other provisions.

47 Ibid, 250. In emergencies, the guidelines could be waived.

48 CT, Aug. 29, 1970, 2.

49 MK, Aug. 30, 1970, 1.

50 "Walworth County Link Told/ Bomb Plot Born in State/ Evidence Revealed by Warren Aide," MS, Aug. 31, 1970, 1.

51 Chi JR, Oct. 1970.

52 Ibid.

53 MK, Aug. 30, 1970.

54 Tom Lubenow, "UW Bombing Linked to Whitewater Area/ Editor Held in Contempt and Jailed," MJ, Aug. 31, 1970, 5.

55 MS, Aug. 31, 1970, 8.

56 MK, Aug. 30, 1970. The transcript of the hearing indicates that it was assistant attorney general Mebane who was questioning Ron Dorfman of the Chicago Journalism Review and that the judge, at the request of Knops' attorney ruled Dorfman's response was a direct response. Considering the point the Kaleidoscope writer was making, it is possible that the judge was doing the questioning, that Mebane argued that the answer was not responsive and that the judge agreed with Loeffler that it was. The transcript shows the same point being made, the wording slightly different. Dorfman's last response in the transcript was: "One oughtn't to predicate the exercise of fundamental rights on the willingness of people to end up in jail." Transcript in file of Knops v. Cummings, 70-C-2708 (U.S.D.C, Eastern Wis.), 80.

57 MK, Aug, 29, 1970, 1.

58 CT, Aug. 31, 1970, 2. Karleton Armstrong, one of the convicted bombers said in a 1973 interview: "I have never met Mark Knops. I (had) absolutely nothing to do with him. He spent four months in jail for printing the communique." WSJ, Oct. 14, 1973, 2. In a later grand jury session, the text of the questions asked indicated that Knops had indicated that he had information about the identity of the bombers and that he had a conversation with a representative of the bombers. That information and the conversation, however, may have been inadequate to actually identify the bombers. See text at note 89, infra.

59 MJ, Aug. 31, 1970.

60 Dorothy Stivarius, "Kaleidoscope Editor Given Six Months," Janesville Gazette, Aug. 31, 1970, 1. (Hereafter, JG.)

61 Larry Tarnoff, "From Editor to Defendant--Only 8 Days," MS, Aug. 31, 1970, 7.

62 JG, Aug. 31, 1970, 1.

63 CT, Aug. 31, 1971, 2. The story carries the by-line of Madison Bureau Chief Frank Ryan. The story did not indicate the day on which the statement was made. Capital Times Editor, Miles Mcmillan, in his column "Hello, Wisconsin" claimed Hanley was directing the grand jury investigation, which Hanley denied. (CT, Sept. 7, 1970, 1.)

64 "We Ain't Gonna Take It/ Mark Knops Still Held Captive--No Appeal 'Til Nov.," MK, Sept. 30, 1970, 5.

65 "Knops: A Political Prisoner," CT, Sept. 26, 1970, 22.

66 CT, Aug. 31, 1970, 2.

67 Ibid.

68 Hanley is identified as the source in: "Junkie Informer Used by Illegal Grand Jury/ Key Witness in AMRC Bombing Heroin Addict," MK, Oct. 18, 1970 and an editorial, "Politics and the Bombing," CT, Sept. 9, 1970, 40. Reporter Tom Lubenow has implied he is the person who received the tip from an unnamed source. Letter to the author,

June 16, 1977. Hanley later became a reporter for the Milwaukee Journal.

69 MK, Oct. 18, 1970, 18.

70 Ibid.

71 Thomas J. Lubenow and Alex Dobesh, "Two Madison Brothers Sought in UW Blast," MJ, Sept. 2, 1970, 1.

72 Ibid.

73 CT, Sept. 3, 1970, 1.

74 CT, Sept. 9, 1970, 40.

75 CT, Sept. 3, 1970, 1. See text and note 11 supra. regarding dating of letter.

76 "Asks Release from Jail/ Kaleidoscope Editor To Get High Court Hearing," CT, Sept. 11, 1970, 47.

77 Ibid.

78 Ibid.

79 Robert Meloon, "High Court Hears Plea for Writ/ State Says Knops Jailing Needed for Probe Powers," CT, Sept. 17, 1970, 1.

80 Ibid.

81 49 Wis. 2d 647, 659.

82 CT, Sept. 17, 1970, 1.

83 Ibid.

84 Ibid.

85 49 Wis. 2d 647, 650.

86 Larry Tarnoff, "Editor Freed but Soon Sent Back to Jail," MS, Sept. 24, 1970, 1.

87 "Knops Gives 8 Answers/ Free Awhile," CT, Sept. 23, 1970, 1.

88 MS, Sept. 24, 1970, 1.

89 "Knops Gets Second Contempt Sentence," CT, Sept. 24, 1970, 4.

90 MK, Sept. 30, 1970, 1.

91 MS., Sept. 30, 1970, 1. Judge Voss expressly adopted both the decision and reasoning of Judge Zastrow's contempt judgment of Aug. 30., 1970. Knops v. Cummings, 70-C-2708, Knops brief, 4.

92 MK, Sept. 30, 1970, 5.

93 MS, Sept. 24, 1970, 14.

94 CT, Sept. 24, 1970, 4.

95 Ibid. Kaleidoscope hawkers had been arrested in September for violating University of Wisconsin regulations that prohibited the sale of newspapers on campus. It was argued at the time that the regulation was selectively enforced, not having been applied to a Wisconsin State Journal hawker, an older man who had sold his papers on campus for years, for example.

96 "Judicial System Enrages Jailed Kaleidoscope Editor," MS, Sept. 24, 1970, 14.

97 Ibid.

98 Ibid.

99 MS, Sept. 24, 14.

100 Mark Knops, "Me & the Man," MK, Mar. 3, 1971, 13.

101 Ibid.

102 "Read This, Mr. America and Find Out How the Madison Straight Press Is Fucking with Your Head!" MK, Sept. 17, 1970, 11.

103 "Statement from the New Year's Gang--Communique from the Underground #2," MK, Mar. 3, 1970, 3.

104 434 F. 2d 1081 (9th Cir., 1970)

105 Ibid.

106 Edward Kerstein, "Right to Confidentiality Argued," MJ, Dec. 3, 1970, II, 16.

107 Ibid.

108 Ibid.

109 Ibid. Few reporters would argue that they need a shield law to protect the confidentiality of official sources. It is unofficial sources who need to be protected from officials.

110 Ibid. Wisconsin did not have statutory privilege. The most recent attempts to adopt such legislation prior to 1970 failed in 1967 and 1969.

111 Ibid.

112 "Principle Cited by Editor in Refusal to Talk," MS, Dec. 18, 1970, 21.

113 Knops v. Cummings, 70-C-2708, Memorandum Opinion and Order, 7, 9. Judge Reynolds also accepted Knops' argument that if he were vindicated by the state supreme court, he would have served all or most of his sentence by the time the decision came. If his conviction were not overturned, and the decision came after his sentence had been complete, Knops argued, he would lose the opportunity to appeal the Constitutional issues in the federal courts because of mootness.

114 MK, Mar. 3, 1971, 13. Knops remained under bail after petitioning the district court in February, 1971, for permanent release from Wisconsin custody following the state supreme court's ruling against him. Thus he had to get court permission to attend a wedding in Chicago in March, to appear before a Sigma Delta Chi convention in Indiana in April, and to go on a short business and vacation trip in June, 1971. The court finally dismissed the petition as moot, July 24, 1973. Knops v. Cummings, 70-C-2708.

115 "Madman Is Loose; Knops Free on Bond for Appeal, MK, Jan. 6, 1971, 6.

116 MK, Aug. 30, 1970, 1.

117 Branzburg v. Pound, 461 S. W. 2d 345 (Ky. 1971).

118 Ibid.

119 In re Pappas 266 N.E. 2d 297 (1971.

120 49 Wis. 2d 647.

121 49 Wis. 2d 647, 659.

122 49 Wis. 2d 647, 651.

123 49 Wis. 2d 647, 659.

124 Ibid.

125 Harold L. Nelson, "The Newsmen's Privilege Against Disclosure of Confidential Sources and Information," Vanderbilt Law Review, XXXIV (May, 1971), 678.

126 49 Wis. 2d 647, 659.

127 Nelson, 676.

128 Department of Justice Memo No. 692.

129 49 Wis. 2d 647, 661.

130 Ibid.

131 49 Wis. 2d 647, 657-8. In the fall following the bombing, security in the form of physical barriers and increased use of guards had been escalated considerably in the Wisconsin State Capitol building and other state facilities. The supreme court is located in the capitol.

132 49 Wis. 2d 647, 659.

133 49 Wis. 2d 647, 661.

134 49 Wis. 2d 647, 660. See footnote.

135 49 Wis. 2d 647, 661.

136 Chi JR, Oct., 1970.

137 William Hauda, "Milwaukee Grand Jury Gives Limited Protection to Newsmen on Sources," CT, Dec. 2, 1972, 4. A request for information about these guidelines has not been answered yet.

138 Ibid.

139 Ibid.

140 MK, Mar. 3, 1971, 13.

141 Peter Bridge, "In Defense of Newsmen's Rights," (MORE), N Nov., 1972, 3. In re Bridge, 120 N.J. Super. 460, 295 A. 2d 3 (1972), cert. denied, 410 U.S. 991 (1972).

142 Robert S. Gallagher, "Peter Bridge Goes to Jail," Saturday Review, Oct. 28, 1972, 7.

143 Bridge, 3.

144 92 S. Ct. 2646 (1972).

145 Norman E. Isaacs, "Sketchy Coverage: Editors Propose, Copy Desks Dispose," Columbia Journalism Review, Sept./Oct., 1972, 2. (Hereafter, Col JR.)

146 "A Self-Inflicted Injury," Col JR, Sept./Oct., 1972, 2.

147 Leamer, 129.

148 Ibid.

149 Ibid.

150 Ibid.

151 See Capital Times, Milwaukee Journal, Wisconsin State Journal, Milwaukee Sentinel, Aug. 27-31, 1970.

152 See page one, Wisconsin dailies, Aug. 27-31, 1970.

153 It is ironic that both trials subsequently resulted in coverage for free press issues. William Farr was cited for contempt for refusing to identify a source who violated a court order. Journalism groups now see the Free Press case as a parallel to the Pentagon Papers case. See, for example, Editor and Publisher, Sept. , 1972, 28. The newsmen's cases are: Farr v. Superior Court, 22 Ca. App. 3d 60, 99 Cal. Rptr. 342 (1971) cert. denied, 409 U.S. 1011 (1972) and People v. Knukin, 107 Cal Rptr. 184 (1973).

154 See Madison and Milwaukee papers, Aug. 24- Sept. 3, 1970.

155 MK, Sept. 17, 1970.

156 Ibid.

157 Ibid. Kaleidoscope claimed that the conspiracy theory linking Sterling Hall and the Old Main bombing was a fabrication.

158 Ibid.

159 MK, Aug. 30, 1970, 2.

160 It is not customary for traditional newspapers to publish radical political statements as part of the news except in connection with coverage of revolutionary acts.

161 WSJ, Aug. 28, 1970, 1.

162 CT, Aug. 27, 1970, 1.

163 See Madison and Milwaukee papers, Aug. 28, 29, 1970.

164 "Bomb Threat Empties Courthouse in Elkhorn," JG, Aug. 28, 1970, 5.

165 Ron Marose, "Madison Asks U.S. for Aid in Strife/ Jury To Probe UW Blast," MS, Aug. 28, 1970, 1.

166 MJ, Aug. 28, 1970, 1.

167 CT, Aug. 29, 1970, 1.

168 WSJ, Aug. 29, 1970, 1.

169 Green Bay Press-Gazette, Aug. 29, 1970, 1.

170 Ibid., Aug. 31, 1970 1.

171 MS, Aug. 29, 1970, 14.

172 JG, Aug. 29, 1970, 1.

173 That was the headline on a Milwaukee Journal story on the arguments before the supreme court: "Right to Confidentiality Argued," Dec. 3, 1970, II, 16.

174 CT, Nov. 28, 1972, 1.

175 WSJ, Oct. 10, 1972.

176 CT, Oct. 20, 1972, 42.

177 WSJ, Oct. 7, 1972, II, 4.

178 Larry Tarnoff, in MS, Aug. 31 and Sept. 24, 1970.

179 JG, Aug. 28-31; Sept. 23-4.

180 Not only did Kaleidoscope and the Chicago Journalism Review deal with reporter's privilege most thoroughly, Kaleidoscope also provided perceptive, if irreverent, press criticism, which was quite distinguished.

181 The State Journal's contempt for Knops was nearly always evident in its coverage.

182 See Capital Times, Milwaukee Sentinel and Janesville Gazette, Sept. 17, 23, and 24; Dec. 2, 17, 18, 23, 24; Feb. 2.

183 MS, Aug. 29, 1970,1. The Milwaukee Sentinel and Milwaukee Journal are both part of the Journal Company.

184 MJ, Aug. 29, 1970, 1. Telephone interview with Pfarrer, J June 20, 1977. MS, Aug. 29, 1970, 1.

185 MJ, Aug. 29, 1970; MS, Aug. 29, 1970; Pfarrer interview.

186 Pfarrer interview.

187 Cases and Briefs, 49 Wis. 2d, 647, Attorney general's brief, 35.

188 MJ, Aug. 29, 1970, 1.

189 MJ, Aug. 31, 1970, 1.

190 Letter to the author, June 16, 1977.

191 MK, Oct. 18, 1970, 18; CT, Sept. 7, 1970, 1.

192 MJ, Sept. 2, 1970, 1.

193 Lubenow letter,

194 MJ, Dec. 24, 1970, 1; MJ, Sept. 24, 1970, II, 12.

195 MJ, Dec. 3, 1970, II, 16.

196 MJ, Feb. 2, 1971.

197 See Rhinelander, Beloit, Wausau, Green Bay, Appleton, Waukesha, La Crosse, Milwaukee, Madison and Janesville newspapers, Feb. 2 and 3, 1971.

198 Green Bay Press-Gazette, Feb. 2, 1971, 1.

199 It was, after all, a county court hearing before a judge of no great reknown in a county of generally rural character.

200 Note comment of Los Angeles Times city editor about the Los Angeles Free Press case, at note 147, supra. and text.

201 Leamer, 156.

202 JG, Sept. 1, 1970, 6.

203 Ibid.

204 MS, Sept. 2, 1970, 12.

205 Ibid.

206 Leamer, 156.

207 Nelson, 677.

208 Rhinelander Daily News, Feb. 5, 1971, 4.

209 Wausau Record-Herald, Feb. 3, 1971, 4.

210 Talk to communications law class, University of Wisconsin, School of Journalism and Mass Communication, Oct. 6, 1972.

211 MS, Sept. 24 and Aug. 31, 1970.

212 "Jailing of Knops Upheld/ Newsmen's Rights Limited," MS, Feb. 3, 1971.

213 MS, Feb. 4, 1971, 16.

214 MS, July 3, 1972, 18.

215 Waukesha Freeman, Feb. 8, 1971, 8,

216 CT, FEb. 4, 1971, 38.

217 CT, Nov. 28, 1972, 32.

218 MS, Sept. 2, 1970, 12.

219 In U. S. v. Caldwell, 408 U.S. 665 (1972), it was a New York Times reporter who was involved.